

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

In re Application of:

Michael Brinkman et al.

Art Unit: 3632

Application No.: 10/743,215

Examiner: Steven M. Marsh

Filed: December 22, 2003

For: **LABEL HOLDER FOR A SHELF PRICE
CHANNEL**

APPELLANTS' REPLY BRIEF

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

In support of the Appellants' Notice of Appeal to the Final Office Action dated April 29, 2005, and in reply to the Examiner's Answer dated September 12, 2007, the Appellants now submit their Reply Brief.

CERTIFICATE OF TRANSMISSION UNDER 37 CFR 1.8

I hereby certify that this Appellants' Reply Brief and all accompanying documents are, on the date indicated below, being transmitted to the United States Patent and Trademark Office via the Electronic Filing System.

<i>Name (Print/Type)</i>	Nancy Kloster		
<i>Signature</i>	/Nancy Kloster/	<i>Date</i>	October 11, 2007

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Real Party In Interest

The real party in interest of the patent application that is the subject of this appeal is Southern Imperial, Inc., the assignee of the entire interest.

Related Appeals and Interferences

There are no related appeals, interferences or judicial proceedings.

Status of Claims

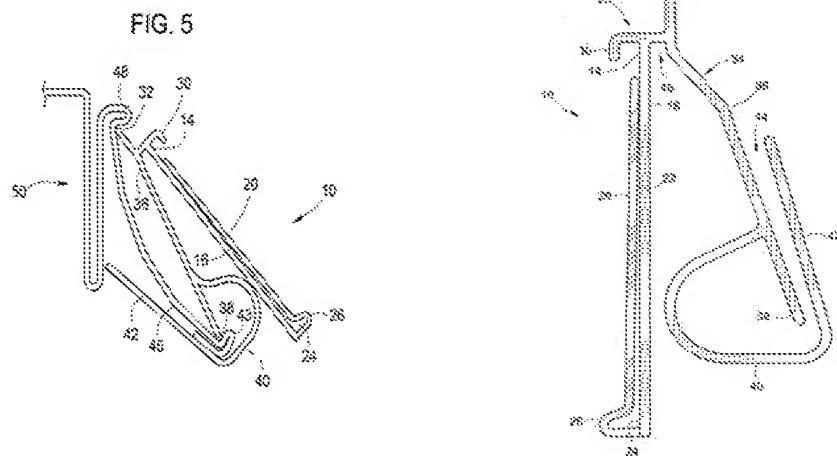
Claims 1-16 of the application are pending in this application and are reproduced in the attached claims appendix. Of these claims, all claims stand rejected as obvious over the asserted combination of U.S. Patent No. 6,688,567 to Fast et al. in view of U.S. Patent No. 6,708,436 to Nagel. Appellants appeal the rejections of all claims 1-16.

Status of Amendments

No amendments have been filed subsequent to the final Office Action dated April 29, 2005.

Summary of Claimed Subject Matter

All references below are to the specification and drawings of the present patent application. Some of the references to the specification are to line numbers of the paragraph where indicated, but are otherwise directed toward the line number on the page.¹ For purposes of ready reference in this section, FIGS. 2 (a label holder) and 5 (a label holder and C-channel shelf combination) are reproduced below:



¹ There is no intent to limit the claims in any manner by references, as this is merely being done for compliance with the appeal rules.

Turning then to the summary of independent claim 1, claim 1 is directed toward a label holder 10 (shown in FIGS. 1-5) intended for attachment to a shelf 50 (shown in FIGS. 3-5). (See page 2, ¶ 11, lns. 1-7; and page 3, ¶ 13, ln. 1). The label holder 10 includes a front panel 20 and a back panel 16. (See FIG. 2, and page 3, lns. 1-2). The back panel 16 is connected to the front panel 20 along a bottom portion 24, and the front panel 20 and the back panel 16 together form a cavity 22 therebetween. (See FIG. 2 and page 3, lns. 1-8). A top flange 28 is provided proximate a top portion (see generally area of reference character 28) of the back panel 16. (See FIG. 2 and page 3, lns. 8-12). A shelf clip portion 34 is joined to the top flange 28 and spaced rearward of the back panel 16. (See FIG. 2 and page 3, lns. 11-14). The shelf clip portion 34 comprises an upward retaining flange 32 for engaging the shelf 50 and a downward angle portion 36 which terminates in a catch flange 38. (See FIG. 2 and also 3-5; see also page 3, lns. 12-14). A curved resilient hinge portion 40 extends from the downward angle portion 36 and wraps around the catch flange 38 to form an upward flange 42. (See FIG. 2, and page 3, lns. 15-21).

Turning then to the summary of independent claim 11, claim 11 is directed toward a shelf and label holder combination. Claim 11 recites a label holder 10 (shown in FIGS. 1-5) mounted on a C-channel shelf 50 (shown in FIGS. 3-5). (See page 2, ¶ 11, lns. 1-7; and page 3, ¶ 13, ln. 1). The shelf 50 includes a top support flange 48, an inwardly curving panel 46 and a lower support flange 43. (See FIGS. 3-5; page 3, ¶ 13, ln. 1 – page 4, ln. 9). The label holder 10 includes a front translucent panel 20 and a back panel 16. (See FIG. 2, and page 3, lns. 1-2). The back panel 16 is connected to the front panel 20 along a bottom portion 24 and the front panel 20 and the back panel 16 together form a cavity 22 therebetween. (See FIG. 2 and page 3, lns. 1-8). A shelf clip portion 34 is joined to a top portion of the back panel 16. (See FIG. 2 and page 3, lns. 11-14). The shelf clip portion 34 comprises an upward retaining flange 32 engaging the top support flange 48 of the shelf 50 and a downward angled portion 36 which terminates in a catch flange 38 that is secured by the lower support flange 43 of the shelf 50. (See FIGS. 2 and 5; see also page 3, lns. 12-14, and page 4, lns. 1-9). A curved resilient hinge portion 40 extends from the downward angle portion 36 and wraps around the catch flange 38 to engage a back side of the inwardly curved panel 46. (See FIGS. 2 and 5; and page 3, lns. 15-21, and page 4, lns. 1-9).

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Grounds of Rejection to be Reviewed on Appeal

Claims 1-16 stand rejected under 35 USC § 103(a) as being obvious over U.S. Patent No. 6,688,567 to Fast et al. (hereinafter "Fast") in view of U.S. Patent No. 6,708,436 to Nagel (hereinafter "Nagel").

Argument

The sole obviousness rejection that has been advanced cannot be legally supported for any of the following reasons below.

A. The Examiner’s Answer Ignores Fast’s Express Identification of the Real “Back Panel” and Ignores Recent Applicable Case Law Precedent Regarding Prior Art.

In his Answer, the Examiner continues to assert that a front panel (i.e., the cover member 18) depicted in Fast, et al. (hereinafter “Fast”) is a back panel. If the Examiner relies upon the real back panel identified at reference number 16 in Fast, the Examiner’s rejection falls apart. As will be more fully explained below, the Applicants respectfully submit that this interpretation by the Examiner is erroneous and must be overturned by the Board.

The Examiner has asserted that the element in Fast associated with reference number 18 is, despite all indications to the contrary, a “back panel.” See Examiner’s Answer, at page 3, first paragraph under the heading “Claim Rejections – 35 USC § 103.” However, the Applicants must point out that Fast expressly indicates that reference number 16, and not reference number 18, is used by Fast to identify a “back or body panel.” *See* Fast, Col. 4, lns. 43-46 (“The merchandising aid 10 includes a label holder portion 15 formed by **a back or body panel 16** and a cover member 18 flexibly secured to each other at hinge or pivot portion 20. (emphasis added)). In light of the above, the specific language used in Fast unequivocally contradicts the interpretation of the Examiner.

In light of the above, the Applicants note that the United States Court of Appeals recently reversed a decision of the Board of Patent Appeals & Interferences (BPAI)² due to an unreasonable interpretation of a reference. In *In re Buszard*, 2006-1489 (Sept. 27, 2007), the Court of Appeals reversed the BPAI and held that it is not reasonable for the Examiner to equate “flexible” with “rigid” in order to maintain an anticipation rejection of a claim when the reference only described a rigid foam reaction mixture that produces a rigid product. Indeed, the Court of Appeals noted that a mechanically “crushed rigid polyurethane foam” is not equivalent to “a flexible polyurethane foam.” The Applicants submit that the Examiner is attempting to do the same in the present case by redefining a cover member as a back panel.

The Examiner is obligated to adhere to the tenet that a “reference must be evaluated from the perspective of those skilled in the art.” *In re Paulsen*, 30 F.3d 1475, 1480-1481, 31 USPQ2d

² No. 2006-1120, 2006 WL 1665669 (Bd. Pat. App. & Int. Apr. 20, 2006).

1671, 1675 (Fed. Cir. 1994). See also *In re Am. Acad. of Sci. Tech Ctr.*, 367 F.3d 1359 (Fed. Cir. 2004) citing *In re Cortright*, 165 F.3d 1353, 1358 (Fed. Cir. 1999) (“Although the PTO must give claims their broadest reasonable interpretation, this interpretation must be consistent with the one that those skilled in the art would reach.”).

Indeed, in *Cortright*, the court held that:

The Board’s construction of the claim limitation “restore hair growth” as requiring the hair to be returned to its original state was held to be an incorrect interpretation of the limitation. The court held that, consistent with applicant’s disclosure and the disclosure of three patents from analogous arts using the same phrase to require only some increase in hair growth, one of ordinary skill would construe “restore hair growth” to mean that the claimed method increases the amount of hair grown on the scalp, but does not necessarily produce a full head of hair.).

(emphasis added)

In the present case, the Applicants note that even the Nagle reference, which is cited and relied on by the Examiner, contradicts the Examiner’s interpretation of the cover member in the Fast reference. Surely the Nagle reference evidences what one skilled in the art would consider “front” and “back” panels.

In addition to the above, the Applicants recognize that elements of a reference are not held to an *ipsissimis verbis* test, i.e., identity of terminology is not required. *In re Bond*, 910 F.2d 831, 15 USPQ2d 1566 (Fed. Cir. 1990). However, the Applicants respectfully submit that the Examiner cannot improperly expand upon this rationale and interpret a reference contrary to the manner in which one skilled in the art would view the reference. Indeed, the Examiner must be prohibited from interpreting the “cover member 18” in the Fast reference in a manner that is repugnant to the express teachings of the reference and the common understanding of that term to one skilled in the art in order to reject claims. Indeed, even if the Examiner’s combination were made, at most cover member 18 would be an intermediate panel. Back panel 16 still remains in Fast and the Examiner cannot change its express disclosure.

Like the Court of Appeals in the *Buszard* case and consistent with the another noted authorities, the Applicants submit that the Board should recognize the repugnant interpretation of the Examiner and require the withdrawal of the obviousness rejection.

Conclusion

In view of the foregoing arguments, Appellants respectfully request the obviousness rejections under 35 USC § 103 be withdrawn against claims 1-16.

Respectfully submitted,

/William H. Dietrich/
William H. Dietrich, Reg. No. 48359
REINHART BOERNER VAN DEUREN P.C.
2215 Perrygreen Way
Rockford, Illinois 61107
(815) 633-5300 (telephone)
(815) 654-5770 (facsimile)

Date: October 11, 2007

Claims Appendix

1. A label holder for attachment to a shelf, the label holder comprising:
 - a front panel;
 - a back panel connected to the front panel along a bottom portion thereof, said front panel and said back panel forming a cavity therebetween;
 - a top flange proximate a top portion of the back panel; and
 - a shelf clip portion joined to the top flange and spaced rearward of the back panel, said shelf clip portion comprising an upward retaining flange for engaging the shelf and a downward angled portion terminating in a catch flange and a curved resilient hinge portion extended from the downward angled portion and wrapping around the catch flange to form an upward flange.
2. The label holder of claim 1 wherein said retaining flange pivots in response to upward pivoting movement of said back panel to secure said retaining flange against the shelf.
3. The label holder of claim 1 wherein said shelf clip portion provides resilient clamping onto the shelf, said catch flange configured to engage a lower shelf channel flange.
4. The label holder of claim 1 wherein said top flange is a protective flange extending forward from the back panel and having a downward depending edge.
5. The label holder of claim 1 wherein the downward angled engaging portion is angled at approximately 20 degrees from vertical.

6. The label holder of claim 1 wherein the label holder is constructed of one or more of polyvinyl chloride, butyrate, provista and acrylonitrile butadiene styrene (ABS).

7. The label holder of claim 1 wherein the label holder is translucent or partially translucent.

8. The label holder of claim 7 wherein the back panel is opaque, the label holder constructed as co-extruded polyvinyl chloride, butyrate, provista or acrylonitrile butadiene styrene (ABS).

9. The label holder of claim 1 wherein a height of the label holder is approximately between 1 inch and 1 ½ inches.

10. The label holder of claim 1 wherein a height of the label holder is approximately between 3 inches and 4 inches.

11. A label holder mounted on a C-channel shelf having a top support flange, an inwardly curving panel and a lower support flange, the label holder comprising:

a front translucent panel;

a back panel connected to the front panel along a bottom portion thereof, said front panel and said back panel forming a cavity there between; and

a shelf clip portion joined to a top portion of the back panel, the shelf clip portion comprising an upward retaining flange engaging the top support flange of said shelf and a downward angled portion terminating in a catch flange secured by the lower support flange of

said shelf and a curved resilient hinge portion attached to the downward angled portion, the curved resilient hinge portion being wrapped around the lower support flange and engaging a back side of the inwardly curving panel.

12. The label holder of claim 11 wherein said retaining flange pivots in response to upward rotational movement of said back panel to secure said retaining flange against the shelf.

13. The label holder of claim 11 wherein the label holder is constructed of one or more of polyvinyl chloride, butyrate, provista and acrylonitrile butadiene styrene (ABS).

14. The label holder of claim 11 wherein said label holder has a height of approximately 1" and 1 ½ ".

15. The label holder of claim 11 further comprising a protective flange extending forwardly from the back panel with a downward depending edge.

16. The label holder of claim 11 wherein the downward angled engaging portion is angled at approximately 20 degrees from vertical.

Evidence Appendix

None.

Related Proceedings Appendix

None.